No. 567

Supreme Court of the United States.

JOHN W. BLYTHE and
HENRY T. BLYTHE,

Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,

Appellee.

REPLY BRIEF

ON BEHALF OF APPELLEE, ON THE MOTION TO DISMISS OR AFFIRM.

W. H. H. HART,
Solicitor for Appellee.

JOHN GARBER,
FREDERIC D. McKENNEY,
ROBERT Y. HAYNE,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1898.

No. 367.

JOHN W. BLYTHE, and
HENRY T. BLYTHE,
Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,
Appellee,

16,952.

[The references are to the top pages of the printed record.]

The briefs of the learned counsel for the appellants have narrowed the discussion. No stress is placed upon any Federal statute, nor upon the epithets and legal conclusions scattered through the bills. Nor is it claimed that there is any showing of fraud, concealment or unfairness of any sort in the probate proceedings, nor that any attempt was made to remove any of the proceedings to the Federal Court. The entire

position seems to be that the decrees of the Superior Court awarding the property to Florence are absolute nullities, and can be collaterally attacked, because it is alleged that the State laws permitting aliens to inherit and providing for the institution of heirship were an invasion of the treaty making power. It is admitted that there was no treaty. (See brief of Messrs. Holladay & Chandler, p. 2.) But it is claimed that the power to make a treaty was of itself an exclusion of the power of the State to pass any law upon the subject, that, therefore, the common law as to aliens prevailed, and that the judgments of the Superior Courts contrary to the provisions of the common law are without jurisdiction.

Upon this question of the validity of the State judgments we stated that the Superior Courts sitting in probate were Courts of general jurisdiction. We find no denial of this in the briefs of Messrs. Holladay & Chandler. The other learned counsel does not directly deny that said Courts are of general jurisdiction; but he cites the case of Smith *vs.* Westerfield (See Judge McKisick's brief, p. 8), in which the opinion contains language to the contrary. What is there said, however, has not been followed. We cited the later decisions on page 28 of our brief; and as the learned counsel have not noticed them, we understand that they do not contest the point. It is not to be doubted that the Superior Court, whether sitting in probate or

not, is a Court of general jurisdiction. And it is not disputed that the Superior Court of San Francisco was the proper Superior Court to administer on Blythe's estate, because he died a resident of that city and county. (See our brief, p. 29.)

Thus the ground is cleared for the discussion of the only ultimate questions which seem to be relied upon, viz: Are the statutes of California an invasion of the treaty making power, and if so, did this render the State decrees absolute nullities? We have only a few observations to make upon the arguments of the learned counsel.

(1). They say that they "respectfully ask this Court "to decide the scope and judicial use of a motion to dis- "miss under the law of 1875." (See brief of Messrs. H. & C., p. 40.) We argued that there is no constitutional question involved. (See our brief, pp. 92-5.) So far as we can see, the learned counsel have not attempted to answer that argument; and it is apparent that it must prevail. This leaves only the certificate of jurisdiction. If the question could be considered, we might very well argue that the motion to dismiss was the equivalent of a general demurrer, especially in view of the fact that the appellants were allowed to amend their bills. But questions of mere procedure cannot be considered on certificate because they do not go to *the jurisdiction* of the Court.

(2). The learned counsel say that the complainants were ~~aliens~~ citizens of another State, and therefore could come into the Circuit Court with their bill, and that their coming in with a case of sufficient amount gave the Court jurisdiction to pass upon it, and that it was its duty to pass upon it. We prophesied that the counsel would so argue. (See our brief, pp. 95-8.) There are several answers to the position, viz:

a. No such question is certified. All the questions relate to the character of the questions arising in the case before the Circuit Court. (Tr., pp. 50-53.) We called attention to this in our opening brief (p. 95). The learned counsel have taken no further notice of it than to say that they have appealed on constitutional grounds as well as upon certificate. As already stated, there is no constitutional ground. (See our brief, pp. 92-5.)

b. The mere competency of the parties to come into Court is not the only thing necessary to call for the exercise of the powers of the Court. Suppose, for example, that an alien should come into the Circuit Court with a petition in bankruptcy, or with a complaint for a divorce against his citizen wife, or with a bill to set aside the election of the Governor of the State for fraud in his election, or to enjoin the State Legislature from passing a law, or to enjoin the State Courts from rendering a decision! No one would say that the Court could entertain such suits. Similarly we say here that

if it be apparent that the judgments of the State Courts are valid judgments, and that there is no semblance of ground for attacking them, the Federal Court has no jurisdiction to interfere with them, any more than it would have to interfere with the action of any other branch of the State Government. To do so would be to invite the very sort of collision between the two judicial systems which this Court has always deprecated and been so careful to avoid. And we submit that the decisions cited in our opening brief (pp. 96-7) sustain our position.

It was in this view that we addressed so much of our argument to the question of the validity of the judgments. While in one sense such argument goes to the merits, in another it goes to the jurisdiction. It does this in two aspects. In the first place, it shows that the bill does not present any of the exceptional cases in which the Federal Courts can interfere with the judgments of the State Courts. And, in the second place, it shows that the pretense of a constitutional question, or even of a jurisdiction, is frivolous and fictitious, and that no such question is really or substantially involved.

(3). The whole foundation of the appellants' case against the decrees consists in the claim that the State statutes permitting the inheritance of real property by non-resident aliens and providing for the institution of heirship are void because they are "an invasion of the

"treaty making power." To this we answered, in the first place, that the statutes in question are not void, because in the absence of a treaty the matter can be regulated by the States. We are content to rest upon our argument in that behalf. (See pp. 64-71.) The learned counsel say that if our position should be sustained the State law would present a "checkered ap-"pearance," because the statute would be valid as to the subjects of nations with whom the United States had a treaty, but not as to the subjects of nations with whom there was no treaty. (Brief of Messrs. H. & C., p. 33). But the same result would follow upon their own argument, only the treaty spots would be upon a common law ground instead of on a statutory one. Indeed, the "checkered appearance" would in all probability not be on our side at all, because our statute is *in favor* of the right of inheritance, and it would be a remarkable kind of a treaty which would stipulate for disabilities.

Counsel further say that a State might deprive non-resident aliens of the equal protection of the laws. It is sufficient in this regard to say that if such a case should ever arise, and should require a remedy, this Court will doubtless afford an appropriate one. Counsel's argument in that regard is merely the old fallacy of arguing against a use from a possible abuse.

Furthermore, notwithstanding the counsel's criticisms, we are confident that the question is covered by

the decisions of this Court. If we are correct in our views as to the "invasion of the treaty making power," then the statutes in question are valid, and there can be no pretext for cavil at the State judgments, and the appellants' whole argument falls to the ground.

In the second place, we said that even if the statutes in question were an invasion of the treaty making power the State judgments, however erroneous, would not be void. The vital proposition here is that the State Courts have concurrent jurisdiction with the Federal Courts over all Federal questions, unless such jurisdiction be taken away by removal proceedings. In addition to what is said in this regard in our opening brief (pp.76-7), we refer the Court to a recent case which subsequently came to our notice.

Plaquemines Fruit Co. *vs.* Henderson, 170 U. S., 511.

If the State Courts had jurisdiction to pass upon the Federal question, they must have had jurisdiction to pass upon it either way. Consequently their decision that the State statutes were valid, even if erroneous, cannot be void. But we may go further than this. Let us suppose that the State statutes are void, and even that the State Courts held them to be so. What is the consequence? Simply that the common law prevails. Now, if the common law be, as counsel say it is, and the decisions of the State Courts are contrary to the

common law, is that a reason why the decisions are nullities? Have the State Courts no jurisdiction to decide questions of common law erroneously?

The learned counsel cite decisions that a conviction in a criminal prosecution under a void statute is void. That is simply because the judgment of conviction must show on its face what the conviction is for. If the statute attempting to make the act a crime be void, the necessary result is that the judgment shows on its face that the act committed was an innocent act and that the accused committed no crime. It is strange to find gentlemen of ability and learning trying to stretch the authority of those decisions to cover judgments in civil cases, where the Court had undoubted power to award the subject of the litigation to one party or the other, and where, in order to sustain their position, they must ask the Federal Court to institute an inquiry into the mental processes of the Judges of the State Court. The mental processes of Judges do not rest in averment.

The learned counsel next make certain statements of fact. They say that the appellee did not set forth the fact of alienage in her petition for the determination of her heirship under Section 1664 (quoted in our opening brief, pp. 35-8), and that such fact "appeared "later *at the trial*" (Brief of Messrs. H. & C., p. 63), and "that the true relation, if any at all, of appellee to

"Blythe was kept out of sight, and not by appellee set "up in her initial pleading," (ib., p. 75); that the proceedings in the State Court were "practically ex "parte," and "appellants appeared therein, *but only to "deny the appellee's title*" (ib., p. 75), and that the appellants here "could not raise these questions, because "the initial proceeding to establish heirship was a "special, practically an ex parte proceeding, in which "defendants (appellants here) were unwilling defend-"ants. The whole case *was tried on the pleadings that "Florence chose to put it*". (Ib., p. 68.)

In reference to these statements, we make the following observations:

a. The bill, after showing the filing of the appellee's petition to determine the heirship and to have it adjudged "in substance that she, said Florence, was "the daughter and sole heir of said Thomas H. Blythe "under and by virtue of said Sections 230 and 1387 of "said Civil Code, or under and by virtue of one or the "other of said sections," expressly and explicitly stated that the appellants here—

> "appeared in said action or proceedings and filed "their answer therein, denying and contesting the "right and title of said Florence *and claiming for "themselves to be heirs of said Blythe;* that there-"after such proceedings were had in said Court in "the said cause that it was for the first time made "to appear plainly to the Court *upon the record*

"that said Florence was an illegitimate child; "that she was born in England," etc. (Tr., p. 9.)

The above averment is in the second amended and supplemental bill. The third amended and supplemental bill not only repeats the above averment but shows that the appellants here filed an answer *and cross-complaint*, "claiming for themselves to be heirs of "said Blythe." (Tr., p. 31.)

Doubtless the statements in the brief were made from inadvertence. In order to guard counsel against misapprehension, we took up about half of the brief whose length they advert to, with a careful statement of the case, giving references in every instance, and facilitating examination by running heads and a marginal index. We respectfully refer to that statement for the facts of the case.

b. But counsel do not claim that the second application, viz: the petition for partial distribution, did not state the fact of alienage. And their bill avers that it did. (Tr., p. 10.) The decree on this application distributed the land in controversy here to the appellee. We have shown in our opening brief that decrees of distribution are conclusive under the State law. (See pp. 43 and 46 and 91.) One decree therefor is as good for our purposes as a dozen. The learned counsel say that the decree upon the proceeding to determine heirship "was and is the only foundation for all subsequent

"action in the State Court." (Brief of Messrs. H. &. C., p. 75.) But if we assume that this was so, it makes no difference. A decision that a prior judgment was *res judicata* is not a Federal question.

N. P. R. R. *vs.* Ellis, 144 U. S., 458.
Adams *vs.* Louisiana, 144 U. S., 651.
Mut. Life Ins. Co. *vs.* Kirchoff, 169 U. S., 103.

c. It makes no difference whether the alienage question was set up in the pleadings in the Superior Court or not. The question of the appellee's capacity to inherit was necessarily involved in the judgment *that she did inherit.* If it were true that the appellants did not set the fact up in their answer, it is apparent that they might have done so. They are now making the same claim to the property that they made in the Superior Court; and under the doctrine of Cromwell *vs.* County of Sac., and the other cases cited in our brief (p. 74), the judgments of the Superior Court are conclusive of everything that might have been set up.

(4). The learned counsel argue that their bills show that upon the application for final distribution the Court refused them a hearing. We had not supposed that this point would be made, and gave it only a passing reference in our statement of the case. (See p. 10.) As the point has been made, we make the following answers to it:

a. According to the bills the question of the appellee's heirship to the whole estate had been twice previously determined in her favor by the Superior Court, viz, in the proceeding to determine heirship and by the decree of partial distribution. Its decrees were affirmed on appeal, and were standing upon its records in full force. Presumably the mandates from the Appellate Court were on file also. The bill does not, as we construe it, purport to state *all* the contents of such petition. (See Tr., p. 11 and pp. 32-3.) It would have been very natural for it to have stated the previous proceedings in the estate; and every presumption is in favor of the action of a Court of general jurisdiction, and is, moreover, against the pleader. That the petition did set forth the prior proceedings is to be inferred from the statement volunteered by counsel to the effect that the judgment in the initial proceeding "was and is " the only foundation for all subsequent action in the " State Court." (Brief of Messrs. H. & C., p. 75.) Furthermore, inasmuch as all the proceedings were *in the same estate*, the previous decrees were before the Court without being pleaded. For the object of the proceeding to determine heirship was to expedite the settlement of estate, and no further trial of the question was necessary or proper. In this regard the State Supreme Court has said, with reference to Section 1664:

"We have no doubt that the object of its enact-
"ment was to expedite such distribution by en-
"abling persons claiming interests in estates to
"have their claims determined in advance of the
"application for distribution, *and when such appli-*
"cation was made and came on for hearing, the Court
"would have no trial of such questions to make, and
"would at once decree to such person ascertained
"to be entitled the portion of the estate adjudged
"to him."

Re Oxarart, 78 Cal., 112.

This must necessarily be so, because to say that the Superior Court must retry the question is to say that it may arrive at a different conclusion. If it had done so, it would probably have had to answer a charge of contempt of the Appellate Court.

Such being the situation, it is no wonder that the Superior Court disregarded the pleading of the appellants, which apparently was in utter disregard of the previous proceedings, and did not deny the appellee's right to the land itself, but simply "denied the right of "said Florence to have said rents distributed to her, "and claimed that they were the next of kin of said "Thomas H. Blythe, deceased, and entitled to said "rents." (See Tr. pp. 11-12 and p. 35.) That was a mere trifling with the Court. It was just as if a party against whom this Court had decided a case in equity should go into the Circuit Court, upon the coming down of the mandate, and seek to retry the whole ques-

tion. And it is not unlike what these appellants desired the Circuit Court to do here, viz, to go into a formal investigation of matters of fact which they themselves set forth in their bills.

b. The decree of final distribution was merely of the rents and profits. While its necessary effect was to confirm the previous decrees (which, however, needed no information to make them final and conclusive) it operated directly only on the rents and profits. Now, the rents and profits are a mere incident to the litigation; and if the land was properly disposed of the incident would not sustain the jurisdiction.

Hipp vs. Babin, 19 How., 271.

(5). The learned counsel say that the question which they present was not decided by this Court in Blythe *vs.* Ayres (167 U. S., 746). If the Court will look into the arguments it will see what was there discussed. But independent of what was discussed, the dismissal of the writ of error necessarily involved one of three propositions, viz, either that no Federal question arose in the State Court, or, if it did arise, that it was correctly decided; or, if it arose and was incorrectly decided, that there were other State questions sufficient to support the decision. Either one of these grounds shows that the State decisions were not mere nullities, but were valid judgments. If no Federal question was involved,

what reason is there for claiming that the State judgments were invalid? If a Federal question was involved, but correctly decided, how does its *correct* decision render the judgment void, and why do the appellants come into the Federal Courts to have it decided differently? If a Federal question was incorrectly decided, but there was a separate State ground sufficient to uphold the judgments, why is not such ground as good in the Circuit Court as it was in this Court? Upon any view, we submit that the validity of the State judgments was necessarily affirmed by the dismissal of the writ of error by this Court. Now, what remains of even the semblance of a case for the appellants if the State judgments are valid?

(6). In our opening brief (p. 100) we respectfully requested the Court to relieve us of the curse of causeless litigation by expressing its opinion upon the jurisdiction of the Federal Courts to entertain attacks upon our muniments of title. Opposing counsel have joined in our request for an expression of the Court's opinion. (Brief of Messrs. H. & C., p. 73.) In this connection, we may add that the learned Circuit Court expressly stated in its final decree that it was "*without prejudice to com-*" *plainants' right to bring or maintain an action at law.*" (Tr., p. 41.) We do not consider ourselves at liberty to go outside of the record by stating why or on whose application this was done. But we most earnestly re-

quest the Court, in the interest of justice, not to leave us open to further attacks in the Federal Courts upon the ground that the question has not been decided.

Respectfully submitted,

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